

E-Filed 9/14/10

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FREDY SALGUERO,
Petitioner,

No. C 10-0366 RS (PR)

ORDER OF DISMISSAL

v.

B. CURRY, Warden,
Respondent.

INTRODUCTION

This is a federal habeas corpus petition filed pursuant to 28 U.S.C. § 2254 by a *pro se* state prisoner. For the reasons discussed herein, respondent's motion to dismiss the petition as untimely (Docket No. 5) is GRANTED. Accordingly, the petition is DISMISSED.

BACKGROUND

According to the petition, in 1990, a Los Angeles County Superior Court jury found petitioner guilty of first degree murder. (Pet. at 2.) The trial court sentenced petitioner to twenty-five years to life in state prison. (*Id.* at 3.) In 2007, the Board of Parole Hearings ("Board") found petitioner unsuitable for parole. In response to the Board's decision, petitioner sought, but was denied, state collateral relief. This federal habeas petition

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1 followed.

2 Respondent contends that the federal petition is untimely, and therefore barred by the
3 applicable statute of limitations, based on its calculations of the time that elapsed between the
4 Board's decision and the filing of the instant petition. (Respondent's Motion to Dismiss
5 ("MTD") at 1.) The following facts are undisputed, unless noted otherwise. The parole
6 decision, which was rendered on November 14, 2007, became final on March 13, 2008.¹
7 Petitioner filed his first subsequent parole habeas 129 days later, on July 24, 2008,² which the
8 Los Angeles Superior Court denied on September 24, 2008, notice of which was mailed to
9 petitioner on September 29. Petitioner mailed his next state petition 31 days later, on
10 October 30, 2008, which was denied on November 19, 2008 by the state appellate court.
11 Petitioner filed his next state petition 146 days later, on April 14, 2009, which the California
12 Supreme Court denied on September 17, 2009. Petitioner mailed the instant federal petition
13 102 days later, on December 28, 2009.

14 DISCUSSION

15 A. Standard of Review

16 The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which
17 applies to every federal habeas petition filed on or after April 24, 1996, contains a statute of
18 limitations codified at 28 U.S.C. § 2244(d). Federal habeas petitions must be filed within
19 one year of the latest of the date on which: (1) the judgment became final after the
20 conclusion of direct review or the time passed for seeking direct review; (2) an impediment
21 to filing an application created by unconstitutional state action was removed, if such action
22 prevented petitioner from filing; (3) the constitutional right asserted was recognized by the
23 Supreme Court, if the right was newly recognized by the Supreme Court and made
24 retroactive to cases on collateral review; or (4) the factual predicate of the claim could have

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26 ¹ Respondent mistakenly gives the date as March 13, 2007. (MTD at 3.)

27 ² Respondent gives the date as July 20, 2008. (MTD at 3.) The Los Angeles Superior
28 Court states that the petition was filed on July 24, 2008. CITE.

1 been discovered through the exercise of due diligence. *See* 28 U.S.C. § 2244(d)(1). “[W]hen
2 a petitioner fails to seek a writ of certiorari from the United States Supreme Court, the
3 AEDPA’s one-year limitations period begins to run on the date the ninety-day period defined
4 by Supreme Court Rule 13 expires.” *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999).

5 **B. Timeliness of the Petition**

6 As stated above, the Board’s decision became final on March 13, 2008. Under section
7 2244, petitioner had until March 14, 2009 to file a timely federal habeas petition. The instant
8 petition was not mailed until December 28, 2009. Absent tolling, the petition is untimely and
9 must be dismissed.

10 **C. Statutory and Equitable Tolling**

11 **1. Statutory Tolling**

12 For purposes of statutory tolling, the time during which a properly filed application
13 for state post-conviction or other collateral review is pending is excluded from the one-year
14 limitations period. *See* § 2244(d)(2). A state habeas petition filed after AEDPA’s statute of
15 limitations ended, however, cannot toll the limitation period. *See Ferguson v. Palmateer*,
16 321 F.3d 820, 823 (9th Cir. 2003) (“[S]ection 2244(d) does not permit the reinitiation of the
17 limitations period that has ended before the state petition was filed,” even if the state petition
18 was timely filed). Section 2244(d)(2) cannot “revive” the limitation period once it has run
19 (i.e., restart the clock to zero); it can only serve to pause a clock that has not yet fully run.
20 “Once the limitations period is expired, collateral petitions can no longer serve to avoid the
21 statute of limitations.” *Rashid v. Kuhlmann*, 991 F. Supp. 254, 259 (S.D.N.Y. 1998).

22 In the instant matter, statutory tolling does not save the petition. 129 days passed
23 between the date on which the Board’s decision became final and when petitioner filed his
24 first state habeas petition. 31 days passed between the date the first petition was denied to
25 when petitioner filed his second habeas petition. 146 days passed between the date the
26 second habeas petition was denied and when petitioner filed his third state habeas petition.
27 102 days after the third petition was denied, petitioner filed the instant petition. The total
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number of days of untolled time is 408 days, which is beyond the one-year filing limitations.³ Statutory tolling, then, does not save the petition. Absent equitable tolling, the petition must be dismissed as untimely.

2. Equitable Tolling

Petitioner has not alleged, nor, certainly, presented any arguments, that he is entitled to equitable tolling. Accordingly, the petition is DISMISSED as untimely.

CONCLUSION

Respondent's motion to dismiss the petition as untimely (Docket No. 5) is GRANTED. Accordingly, the petition is DISMISSED.


A certificate of appealability will not issue. Petitioner has not shown "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

This order terminates Docket No. 7.

The Clerk shall enter judgment in favor of respondent, terminate the pending motion, and close the file.

IT IS SO ORDERED.

DATED: September 13, 2010



RICHARD SEEBORG
United States District Judge

³ Even if one discounts the perhaps reasonable 31 day delay, the delay was 377 days, still beyond the deadline.